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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 4 ORIGINAL

STATE OF NEW YORK,

Complainant,

against

STATE OF ILLINOIS and SANITARY DISTRICT OF CHICAGO,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION BY THE STATE OF NEW YORK FOR LEAVE TO FILE A SUPPLEMENTAL AND AMENDED COMPLAINT

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Statement

The defendants' brief in opposition to complainant's motion for leave to file a supplemental and amended complaint makes three principal contentions:

(1) That the filing of the supplemental and amended complaint would occasion delay of the trial before the Special Master;

(2) That the supplemental and amended complaint would, *for the first time,* inject in the case the issue of the disposal of the effluent from Chicago's domestic pumpage by the Metropolitan Sanitary District of Greater Chicago, and

(3) That a supplemental and amended complaint is not procedurally proper, and that the Amended Application to reopen the decree contains all of the allegations which the State of New York seeks to present.

The foregoing arguments make this reply brief necessary to emphasize:

(1) That no delay will be occasioned by the filing of the supplemental and amended complaint;

(2) That the issue of the disposal of domestic pumpage effluent was originally raised in New York's 1926 Bill of Complaint, was again raised in the complainant's 1958 Amended Application to reopen the decree, and has already been referred to the Special Master by this Court. The defendants are now actually attacking the propriety of that referral; and

(3) That the defendants' argument as to the procedural propriety of the supplemental and amended complaint distorts the prior history of this action, the procedural cases in point previously cited by this complainant, and the complainant's purpose in filing the supplemental and amended complaint. Complainant's real purpose is to present its contentions in a single up-to-date pleading in proper form, to insure that under the present reference there may be a final and complete resolution of this serious controversy which has now been continuing for over thirty years.

I.

The supplemental and amended complaint would cause no delay in this proceeding.

Since the filing of this complainant's prior brief in support of the motion, hearings with regard to Original Nos. 2, 3, 4 and 12 have proceeded with all possible dispatch

before Special Master Maris in Chicago. The State of Illinois, plaintiff in No. 12, has completed its direct case relating to No. 12, subject only to certain further cross-examination. State of New York as complainant in No. 4 and defendant in No. 12 has presented the testimony of four witnesses relevant to both cases.

Hearings are presently in recess and are scheduled to resume on February 3, 1960, at which time there will be such further cross-examination, an extensive examination, relative to all of the cases, of an official representative of the Corps of Engineers called as the Court's witness, and presentation of certain witnesses by the defendants in No. 12. The Special Master has stated that following the completion of that session sometime in February the hearings will reconvene on March 7, 1960, at which time the State of New York will offer certain evidence of the damage caused by the existing diversion at issue in Nos. 2, 3 and 4, and which would be caused by the new proposed diversion at issue in No. 12, both to hydroelectric plants on the St. Lawrence and Niagara Rivers and to recreational interests of the State of New York.

It may be noted that this complainant's proposed supplemental and amended complaint raises no issue not previously raised by the Amended Application to reopen the decree and referred to the Special Master by this Court's order of June 29, 1959, which granted such Amended Application. This fact was conceded by the defendants' brief (pages 11-13).

In contrast, the United States of America has made a motion to intervene in Nos. 2, 3, 4 and 12, and has filed, as Petitions of Intervention, two new pleadings. These new pleadings raise completely new issues, e.g., the rights of the United States with relation to Indian and other Federal reservations, the rights of the United States with

relation to pollution of interstate waters and the rights of the United States with relation to maintenance of friendly relations with Canada. Nevertheless, this complainant, which will not oppose such intervention, assumes that such intervention will be granted. Nor does it appear to this complainant that injection of such new pleadings of the United States would delay the hearings.

Reference to the Special Master of the supplemental and amended complaint creating no issues not previously referred to him could not conceivably delay the proceedings. On the contrary, availability of a single document setting forth the State of New York's present contentions with regard to Original No. 4 would rather tend to expedite the hearings and other proceedings in these actions and make it unnecessary for the parties (including the new party, the United States of America), the Court, and the Special Master to refer to an outmoded Bill of Complaint together with the Amended Application to reopen.

II.

Objections to diversions of domestic pumpage have been previously presented in this proceeding and this Court has adjudicated that defendants have no lawful right to make such diversions.

Defendants make inconsistent and contradictory assertions that the issue of the right of defendants to divert the effluent from domestic pumpage out of the Great Lakes watershed had never previously been presented in this action, and also that such previously unraised issue has been decided in favor of defendants. Both assertions are baseless.

This issue was clearly raised in New York's original Bill of Complaint of 1926, and again by the complainants' Amended Application of 1958 for reopening of the decree of April 21, 1930. Paragraph III A (p. 5) of the Amended Application stated that

> "We [the complainants] do not question the right to use the water that is the so-called domestic pumpage *provided it is then returned to the Great Lakes basin.*" (Italics supplied.)

Paragraph VIII of such Amended Application, speaking specifically of the diversion of domestic pumpage, stated in part

> "Such diversion of the waters of the Great Lakes system is in violation of the rights of complainants, and is causing extensive, substantial and continuing damages to the complainant states and their peoples.
>
> "Such diversion is not necessary for the purposes of disposing of the sewage of the Chicago area. Nor is it necessary for the protection of the water supply of the Chicago area and the health of the people of the Chicago area.
>
> "Other Great Lakes communities that take their water supply from the Great Lakes or their connecting channels return such water, after use, to the lake or watercourse from which it was obtained * * *"

Paragraph IX alleges that

> "Cessation of the diversion by the defendants of the waters of the Great Lakes—St. Lawrence system, as domestic pumpage, will not injure or impair the health of the people of the Chicago area or the navigability of the Port of Chicago, or of the Chicago Drainage Canal, or of the Illinois Waterway. (See Par. XIII, infra)"

In paragraph X of the Amended Application, the complainants itemize the damage

> "caused by defendants' action in diverting the waters of the Great Lakes—St. Lawrence system as domestic pumpage through the Sanitary District Canal * * *"

In paragraph XIII of the Amended Application complainants

> "allege that no diversion as 'domestic pumpage' is necessary for navigational purposes and demand a cessation of diversion of water for 'domestic pumpage' from the Great Lakes Basin."

In paragraph XIV,

> "In further support of their allegation that no water should be diverted and permanently abstracted from the Great Lakes Basin for 'domestic pumpage', complainants allege that it is possible and feasible to return the effluent from the Sanitary District's treatment plants to Lake Michigan without endangering the domestic water supply taken from said lake by the City of Chicago and other municipalities * * * [detailing the basis for such allegation]. * * *"

Finally, in the Prayer for Relief, the complainants prayed:

> "(1) That the State of Illinois and the Metropolitan Sanitary District of Greater Chicago be forthwith restrained and enjoined from discharging any of the treated effluents emanating from its sewage and industrial treatment facilities into the Sanitary and Ship Canal, and that said State of Illinois and the Metropolitan Sanitary District of Greater Chicago be required by mandatory injunction of

this Court to return all of said effluent to the Great Lakes Basin from which it originally came in the form of 'domestic pumpage,' the aforesaid injunctions to be made effective at such times and under such terms as to this Court shall seem meet and just.

(2) That if such decree is not made forthwith, a Special Master be appointed to take testimony and evidence with respect to the issues contained in this petition and to report with respect to the time, method, and manner in which the State of Illinois and the Metropolitan Sanitary District of Greater Chicago shall comply with Paragraph (1) of this prayer, and with respect to whether the Court should appoint a Permanent Master invested with such authority as he may require for the purpose of maintaining surveillance over the operation of the sewers, interceptors, and other sewage and water collecting facilities and the sewage disposal and industrial treatment plants and works operated by the Metropolitan Sanitary District of Greater Chicago."

The defendants' refusal, at pages 14-19 of their brief, to recognize that the issue of return of domestic pumpage to Lake Michigan was encompassed by the Amended Application seems particularly odd in view of the fact that they did recognize such issue at pages 11-13 of the same brief, and also when they filed their brief in opposition to the Amended Application. Point III of that brief is entitled

"The Equitable Considerations Which Caused this Court in 1930 to Reject Complainants' Demand for the return of Domestic Pumpage to Lake Michigan Are More Compelling Today."

Obviously the defendants are merely using the present motion to attempt to reargue contentions previously made

by them and rejected by this Court when it granted the Amended Application. The complainants in the Amended Application specifically demanded return to Lake Michigan of the domestic pumpage effluent; that is one of the issues now before the Special Master, and the proposed supplemental and amended complaint could not delay the proceeding merely by pleading the same issue in a more formal document.

Furthermore, as previously noted, this issue was raised long prior to the Amended Application, and in fact was first raised by this complainant in Paragraph III of the original 1926 Bill of Complaint. Paragraph III stated in part:

> "The order of precedence in the use of the waters of this [Great Lakes] waterway is (i) domestic and sanitary purposes in the ordinary, reasonable and generally approved manner in the use of water for such purposes, *after which use water so used must be returned to the stream from which it is taken;* (2) navigation; (3) development of power and other legitimate uses. * * * The right to the use of this water for the development of power is a property right of the State of New York and its citizens, which property right neither the defendants nor the Congress of the United States has a right to destroy or impair by abstracting or diverting water from Lake Michigan or any other part of the Great Lakes and St. Lawrence waterway into the Mississippi waterway." (Italics supplied.)

The prayer for relief of such Bill of Complaint prayed for an injunction.

> "* * * restraining the defendants and each of them and each of their officers, agents or servants from taking or causing to be taken, *any water whatever* from Lake Michigan and its natural tributaries in

> such manner as to permanently divert the same from the said lake and said watershed." (Italics supplied.)

This Court at 274 U. S. 488 struck paragraph III from the complaint on the ground that the paragraph

> "apparently proceeds on the theory that the diversion may interfere with or prevent the use of the waters of the Niagara and St. Lawrence Rivers by the plaintiff State and her citizens for the development of power."

Since there was not at that time any such hydroelectric use or project for such use, the Court held the paragraph to present only abstract questions, and ordered the paragraph stricken

> "without prejudice, so that the plaintiff State, if later on in a position to do so, may be free to litigate the questions which the paragraph is intended to present."

The issues raised by old Paragraph III have now become concrete by virtue of the completion of the St. Lawrence power project and the present construction of the Niagara power project. With the realization of those projects, it is now possible to restate the issues alleged in old Paragraph III with a degree of specificity and detail not possible in 1926. This Court in striking old Paragraph III clearly intended to allow the complainant, when in a position to do so, to litigate the questions there intended to be presented under an up-to-date, complete and specific pleading.

The defendants' attempt to argue the legal merits of the domestic pumpage issue is not germane to the present motion; however it would seem desirable to correct the

defendants' erroneous statements in this regard. The Court did not decide that defendants had a right to permanently divert domestic pumpage; to the contrary, it decided that such a diversion was in violation of the complainants' legal rights.

While the Court did not in 1930 enjoin the diversion of the domestic pumpage of the City of Chicago, this action of the Court was based on practical considerations of hardship, and not on any legal right of the defendants. In arguing to the contrary, defendants choose to confuse or ignore the dual aspects of an equity decision, which must deal with both right and remedy.

In deciding this case, this Court was required to determine wherein lay the *legal rights* to the use of the flow of the Great Lakes watershed, and the Court determined such *legal rights* adversely to the defendants in its decisions at 278 U. S. 367 and 281 U. S. 179. However, in providing the *equitable remedy* the Court could not give immediate and complete realization of the legal rights because of considerations of relative suffering as they existed at that time.

As was stated by this Court in *New York* v. *Illinois* at 289 U. S. 395, 405,

> "The decision was that this wrong [to the complainants] must be stopped. It was not stopped at once merely because of the plight of the residents of Chicago and the adjacent area, in whose interest time was sought to provide works and facilities for sewage disposal. The Court fittingly recognized this exigency."

This Court's opinions make clear that any diversion other than for the purposes of maintaining navigation was illegal, the Court stating:

"And insofar as the prior diversion was not for the purposes of maintaining navigation in the Chicago River it was without any legal basis, because made for an inadmissible purpose. It therefore is the duty of this Court by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis, and thus to restore the navigable capacity of Lake Michigan to its proper level."

(*New York* v. *Illinois*, 278 U. S. 367, 420.)

That the Court specifically recognized the lack of any legal right of the defendants to permanently divert domestic pumpage from the Great Lakes is further apparent from the terms of the decree itself (281 U. S. 696). The decree enjoins the defendants, their employees and their agents, and all persons assuming to act under the authority of either of them, from diverting any of the waters of the Great Lakes—St. Lawrence system or watershed in excess of certain prescribed quantities. The Court for the time being excepted Chicago domestic pumpage from this prohibition, but did not except any other Illinois domestic pumpage. In prohibiting the diversion of any domestic pumpage other than that of the City of Chicago, the decree recognized the fact that all permanent diversions of domestic pumpage are without legal basis.

However, as with the direct diversion which was also adjudicated to be without legal basis, the Court could not in the remedial aspect of the decree give immediate and full realization of the plaintiff's rights in view of the practical considerations as they existed at that time.

"They [the complainant States] also argue that what is called the domestic pumpage after being purified in the sewage works be returned to the Lake. These demands seem to us excessive *upon*

the facts in this case." (281 U. S. 199) (Italics supplied.)

The Court went on to say (p. 200):

> "If the amount withdrawn should be excessive, it will be open to complaint."

The Court, moreover, specifically left the decree open and retained jurisdiction for applications "for any other or further action or relief" (281 U. S. 696, 698).

Very clearly, this decision in regard to the remedy was on the facts as they existed at the time, and was subject to modification when, as complainant now alleges is the case, the full restoration of complainant's rights is practically feasible without undue hardship to the defendants.

It may be further noted that the Court nowhere approved of Special Master Hughes' legal conclusions, so extensively quoted in defendants' brief. In this instance as in the basic decision (278 U. S. 367), the Court completely accepted Special Master Hughes' factual determinations while rejecting his legal recommendations.

III.

The supplemental and amended complaint is procedurally proper.

Contrary to the implication in defendants' Point IV, complainant is not seeking to file a supplemental and amended complaint in order to state "a more attractive case." No new issues are presented in the supplemental and amended complaint which have not been presented by the Amended Application. The supplemental and amended complaint was presented, as was pointed out in the motion and in the prior brief in support thereof, as a procedurally

proper method of putting the pleadings in order pursuant to the Federal Rules of Civil Procedure, which Federal Rules the Rules of this Court make applicable to original actions. Complainant seeks thereby to avoid any claim by the defendants at some future date that the issues presented in the Amended Application were not presented by a proper pleading.

Further, defendants again confuse the legal right and the equitable remedy. A supplemental bill after a final decree might be improper if a complainant thereby sought modification of the legal rights previously adjudicated. This complainant seeks no such modification, since the legal rights have already been decided completely in its favor.

However, as pointed out in the prior brief in support, a supplemental and amended complaint (as the modern equivalent under the Federal Rules of Civil Procedure to the old supplemental bill in equity), is an approriate procedural method of presenting to the Court events which have occurred since the decree and which make further relief necessary and proper to protect the legal rights of the parties.

In the instant case, changes in circumstances occurring since the 1930 decree have changed the considerations of "relative suffering" which at that time prevented full and immediate restoration of the complainants' rights. These changes consist both in an increase of the injury to the complainants from diversion of domestic pumpage and of it now being practicable, without any undue suffering, for defendants to return treated sewage effluent to Lake Michigan. The supplemental and amended complaint points out, as did the Amended Application, that such changed circumstances require a more complete restoration of the complainants' rights than was practically possible in

1930; such procedure would be proper even if the decree had not been expressly left open to application for further relief.

Contrary to defendants' statement (brief, page 24 fn. 21), an allegation that an original decree was violated is not a *sine qua non* to a supplemental bill, and *Connett* v. *City of Jerseyville*, 96 F. 2d 392 (7th Cir. 1938), inexplicably cited by defendant in support of that assertion, clearly indicates the contrary. In that case the original decree ordered foreclosure and sale for the benefit of creditors of a municipal water system. No buyers having been found on the foreclosure sale, the supplemental decree following the supplemental bill required that the municipality raise its water rates. Nowhere does it appear in that case that anyone violated the original foreclosure decree. It is plain that there, as here, a supplemental bill was used where the original decree, even though it had been carried out so far as its terms went, failed to restore the rights which the Court had adjudicated resided in the plaintiffs. If the failure to restore plaintiff's rights were caused by contempt of the decree, the obvious remedy would be not a supplemental complaint, but rather a motion to punish for contempt. New York is not at this time making such motion.

CONCLUSION

The defendants have not shown any reason why this complainant should not be allowed to file a supplemental and amended complaint, which by presenting to the Court in a single, up-to-date pleading the issues raised by the Amended Application and the prior pleadings herein will expedite a final and complete disposition of this action.

Respectfully submitted,

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